Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

BARBARA ANN JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

COPY

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QUESTIONS PRESENTED

1. Based upon the evidence before it, was the United States District Court correct in ruling that Petitioner's claim was time-barred?
2. Was the United States District Court correct in ruling that petitioner's claim was dismissed with prejudice due to lack of personal and subject matter jurisdiction?
3. Was the dismissal of Petitioner's claim with prejudice on the grounds that Petitioner failed to prove that she had filed her claim with the appropriate Federal agency prior to filing her complaint in the appropriate United States District Court a denial of procedural due process when the District Court had not established the date upon which Petitioner's time to file her claim had not been established by the District Court?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

1. ORDER, filed July 12, 2001, by United States Court of Appeals for the Ninth Circuit denying petitioner's Petition for Rehearing En. Banc.
2. MEMORANDUM, filed April 18, 2001, by the United States Court of Appeals for the Ninth Circuit affirming the dismissal of the Petitioner's complaint by the United States District Court for the Southern District of California for lack of personal and subject matter jurisdiction and insufficiency of service of process.
3. ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, filed May 16, 2001, by the United States District Court for the Southern District of California dismissing with prejudice petitioner's complaint for lack of subject matter jurisdiction, insufficiency of service of process and because her claim was time-barred.

STATEMENT RE JURISDICTION INVOLVED

The Memorandum filed in the United States Court of Appeals for the Ninth Circuit on April 18, 2001, affirmed the Order of the United States District Court for the Southern District of California dismissing petitioner's complaint with prejudice for lack of subject matter jurisdiction, insufficiency of process and because her claimed was time-barred.

On July 12, 2001, the United States Court Appeals for the Ninth Circuit filed its Order denying Petitioner's Petition For A Rehearing En Banc.

The jurisdiction of this Court is involved pursuant to Rule 10.1 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The petitioner herein, BARBARA ANN JOHNSON, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on April 18, 2001, affirming the Order Granting Defendant's Motion to Dismiss filed on May 16, 2000, I the United States District Court for the Southern District of California, which dismissed with prejudice petitioner's Amended Complaint For Damage Due to Conspiracy and Personal Injury. The District Court dismissed petitioner's complaint with prejudice for lack of subject matter jurisdiction to hear petitioner's action due to the fact that petitioner failed to file an administrative claim with the appropriate Federal agency pursuant to 28 U.S.C. §2675(a) and because exhaustion of claims procedures established in the Federal Tort Claims Act is a prerequisite to District Court action pursuant to Burns v. United States 764 F.2d 722, 724 (9th Cir. 1985). Therefore, the District Court granted defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b) (1). And because the District Court was "skeptical" that any amendment could possibly save petitioner's claim since it "seemed" likely that petitioner was time-barred from pursuing her claim and that it was evident that petitioner had no certified receipt from mailing the claim to the Attorney General, the District Court granted defendant's motion to dismiss petitioner's complaint with prejudice.

Petitioner is an elderly single woman who resides at 9255 Magnolia Avenue, Unit 17, Santee, California 92071.

In her complaint filed in the United States District Court on or about June 8, 1998, The petitioner alleged that

Chief James Allen Cantley of the United States Navy conspired with Dr. Richard Duback, an employee of the United States of America, and Reese Staley Clinic and the United States Government to implant a radioactive chip in and behind her left ear, which now sends code impulses to scanners monitored by the United States intelligence community as part of defendant's experience using humans as guinea pigs. The implantation was accomplished without the knowledge or permission of the petitioner.

After the implantation, petitioner began to suffer damage to her central nervous system, damage to her liver, insomnia, diarrhea, headaches, earaches, dizziness, over sensitivity to light, vomiting, stomach pain and radioactive poison.

After an extensive period of medical treatment to find out the cause of her suffering and medical problems, petitioner finally discovered the cause of her injuries in the middle of 1998 Therefore, on August 26, 1998, petitioner caused a Form 95 Claim for Damage Injury or Death to be mailed first-class U.S. Mail to Janet Reno, United States Attorney General, Department of Justice, at 950 Pennsylvania Avenue, Washington, D.C. 20530-0001.

As the petitioner received no response to her form 95 claim for Damage Injury or Death, she elected to consider her claim rejected pursuant to 28 United States code, Section 2675(a) and filed a complaint for damages due to personal injury in the United States District Court for the Southern District of California on June 8, 1999.

On January 10, 2000, the defendant United States filed a motion to dismiss on the grounds that the appropriate United States Agency had not received petitioner's Form 95 Claim for Damage Injury of Death prior to the filing of her complaint in the District Court. As petitioner could not prove that her Form 95 had been

received by the United States Department of Justice, The District Court Dismissed petitioner's complaint with leave to amend.

On March 23, 2000, petitioner filed her Amended Complaint Due to Conspiracy and Personal Injury and on April 7, 2000 defendant again filed a motion to dismiss on the grounds that the court lacked jurisdiction due to the fact that petitioner had failed to file an administration claim as prescribed by the Federal Tort Claims Act and that petitioner's claim was time-barred because the alleged injury occurred in 1978.

On May 5, 2000, petitioner filed her opposition to the motion to dismiss on the grounds that the Form 95 had been mailed by first-class U.S. mail and had not been returned, and that she could properly assume that the mailed Form 95 had been received and that the claim was not time-barred on the grounds that two years had not elapsed since the discovery of the cause of her injury, as she had not discovered the cause of her injuries until the middle of 1998.

On May 16, 2000, the United States District Court filed its Order Granting Defendant's Motion To Dismiss with prejudice on the grounds that the court lacked jurisdiction and that the claim appeared to be time-barred. On June 12, 2000, petitioner filed her Notice Of Appeal to the United States Court of Appeals for the Ninth Circuit.

On April 18, 2001, the three-judge panel of the Ninth Circuit Court of Appeals filed its Memorandum affirming the District Court's order and the reason therefore and that any amendment to correct the jurisdiction deficiencies of the amended complaint would be futile.

As the three-judge panel of the Ninth Circuit Court of Appeals had not understood petitioner's arguments in

opposition to the District Court's dismissal of her complaint with prejudice, the petitioner petitioned the Circuit Court for a rehearing en banc.

On July 12, 2001, the United States Court of Appeals for the Ninth Circuit denied petitioner's petition for rehearing en banc and closed her appeal

STATUES INVOLVED IN THIS CASE

Title 28, United States Code, section 1346 (a)
Section 2401 (b)
Section 2674
Section 2675 (a)

Federal Rules of Civil Procedure,
Rule 12 (b)
Rule 41 (b)

WHEN QUESTIONS PRESENTED FOR REVIEW WERE PRESENTED TO THE LOWER COURTS

The issues of whether or not petitioner's claim was time-barred on May 16, 2000, and whether or not the United States District Court for the Southern District of California was procedurally correct in dismissing the claim of the petitioner with prejudice due to lack of subject matter jurisdictions were presented to the United States Court of Appeals for the Ninth Circuit by the petitioner in her Opening Brief and in her Petition for Rehearing En Banc.

BASES FOR FEDERAL JURISDICTION IN UNITED STATES DISTRICT COURTS

This case involves a claim against the United States of America for damages due to personal injury caused by an employee of the government of the United States of America acting in the regular course of his employment. Such claims are allowed by the United States Congress pursuant to Title 28, United States Code, section 2674. Original jurisdiction over such claims is given to the United States District Courts pursuant to Tile 28, United States Code, section 1346, (a) (2).

ARGUMENT

A. THE DISTRICT COURT LACKED JURISDICTION TO REACH THE MERITS OF THIS CASE

This case involves the dismissal of petitioner's Amended Complaint by the United States District Court for the Southern District of California for lack of Jurisdiction. The complaint was dismissed with prejudice, preventing the petitioner from refilling her claim and filing a new complaint for her personal injuries.

Defendant moved to dismiss the Amended Complaint herein upon the grounds that the petitioner failed to file an administrative claim with the proper United States Agency. However, petitioner did mail a claim for her injuries to the United States Attorney General, Department of Justice. The Declaration of Arlene A. Ranson attests to that fact.

Title 28, United States Code, section 2675 states that an action shall not be instituted upon a claim against the United States for money damages for injury or personal injury caused by the negligent or wrongful act of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and the claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The statues also states that the failure of the agency to make a final disposition of the claim within six months after the claim was filed, at the option of the claimant anytime thereafter, may be deemed a final denial of the claim. Petitioner mailed her claim to the Department of Justice on August 26,

1998. Nine months later the petitioner had received no response to her mailing from the Department of justice. Therefore, pursuant to the provisions of 28 USC §2675, the petitioner had the legal right to file the complaint herein. (Parker v. United States, 935 F.2d 176, 177(9th Cir. 1991; Reo v. United States, 98 F.3d 73 (1996).)

Petitioner proceeded in this action upon a presumption that her claim had been received by the United States Department of Justice because the claim had been placed in a sealed envelope with first-class postage fully prepaid thereon and properly addressed to Janet Reno, United States Attorney General, in Washington, D.C. and that same envelope was deposited with the United States Postal Service in Santee, California. The defendant does not dispute that the envelope was correctly addressed.

The defendant contends that the said envelope was never received by the Department of Justice; however, the presumption of the petitioner was not misplaced. Both California and Federal law presumes that proof of mailing creates a presumption of receipt by the addressee. (Cordaro v. Lasardi, 354 F.Supp. 1147 (1973); In re Conservatorship of Wyatt (4th Dist. 1987) 195 Cal.App.3d 391.) California law further states that service is complete at the time a document is deposited in the United States Mail. (Silver v. McNames (4th Dist. 1999) 69 Cal.App.4th 269; Sharp v. Union Pacific R.R. Co. (5th Dist. 1992) 8 Cal.App.4th 357; McKoen v. Sambrano (1927) 200 Cal. 739; In re Richard's Estate (1908) 154 Cal. 478; Brown v. Greene (1884) 65 Cal.221.)

The petitioner made a plausible presumption that as the envelope containing her claim was not returned to her as undeliverable, the envelope containing her claim

had been received by the United States Justice Department.

It is true that the presumption of receipt is a rebuttable one, which defendant must overcome. (Cordaro v. Lasardi, Supra at page 1149; People v. Cavanaugh (1965) 234 Cal.App.2d 316; Forslund v. Forslund (1964) 225 Cal.App.2d 476.); however, it is the addressee who assumes the risk of the failure of the mail. (McKeon v. Sambrano, Supra.) Thus, the addressee must overcome the presumption of receipt with sufficient evidence to do so; otherwise the court may proceed with jurisdiction. (Cordaro v. Losardi, Supra; Forslund v. Forslund, Supra.)

The district Court decided that the Department of Justice did not receive the petitioner's claim based upon the evidence presented and had no alterative but to dismiss petitioner's Amended Complaint for lack of Jurisdiction. (Avril v. United States, 461 F.2d 1090 (9th Cir.1972.) However, the District Court should not have dismissed the Amended Complaint with prejudice.

Pursuant to Federal Rules of Civil Procedure, Rule 41 (b) a dismissal other than for lack of jurisdiction is with prejudice. A dismissal for lack of jurisdiction because the petitioner failed to comply with a precondition requisite to the court's going forward to determine the merits of the substantive claim, should not be afforded res judicata effect because it falls within one of the exceptions stated in Rule 41 (b). (Costello v. United States, 364 U.S. 265, 286 (1961); In re Marino, 213 B.R. 846, 851-854 (9th Cir. BAP 1997); Criales v. America Airlines, Inc. 105 F.3d 93, 96 (2nd Cir.1997); Guidry v. Bank of LaPlace, 954 F.2d 278, 287 (1992).)

In Costello v. United States, 365 U.S. 265 at pages 285-288 this Court addressed the issue of a dismissal

for lack of jurisdiction because a plaintiff failed to perform a prerequisite act necessary for the court's jurisdiction of the case. This Court stated that in such a situation, if the first suit was dismissed for want of jurisdiction, the judgment rendered will prove no bar to another suit. A dismissal of petitioner's claim with prejudice renders the dismissal res judicata and a bar to another suit. The District Court's ruling was contrary to this Court's ruling Costello.

The right to sue the United States of America exists wholly by consent of the government as expressed in Title 28, United States Code, section 2675, which fixes the terms and conditions on which suits may be instituted. The first requirement is the filing of a claim. That requirement is jurisdictional and is not waivable. (Kielwien v. United States, 540 F.2d 676, 679 (4th Cir. 1976); Provancial v. United States, 454 F.2d 72, 74 (8th Cir. 1972).) A dismissal for lack of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily, such a dismissal is "without prejudice". (Korvettes Inc. v. Brous, 617 F.2d 1021, 1024 (10th Cir. 1980.).) As the District Court herein acquired no jurisdiction over the matter, the District Court had no authority to reach the merits of the case and the dismissal should have been without prejudice. (Melo v. United States, 505 F.2d 1026, 1030 (8th Cir. 1974); Durham v. Mason and Dixon Lines, Inc., 404 F.2d 864, 865 (6th Cir.1968.).) The label "with prejudice" attached to the dismissal of a claim signifies that the dismissal is an adjudication of the merits and hence a bar to further litigation of the claim. (Korvettes, Inc. v. Brous, Supra.) A dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits and thus does not have a res judicata effect

upon the claim. (Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1468 (10th Cir. 1993).)

As 28 USC §2675(a) does not authorize suits prior to an administrative decision and does not authorize the District Courts to postpone suits filed to such decisions, the proper recourse in such situations was for the District Court to dismiss petitioner's Amended Complaint without prejudice for lack of jurisdiction allowing the petitioner to present her claim to the Department of Justice pursuant to law and to file a new complaint when and if the Department of Justice made its determination upon her claim. (McNeil v. United States, 508 U.S. 106, 112-113 (1993); McNeil v. United States, 964 F.2d 647(7th Cir. 1992).)

In its order Granting Defendant's Motion To Dismiss, the District Court stated that petitioner should have refilled her claim with the Attorney General, if, in fact, the statue of limitations had not run on her claim. However, a refilling of her claim with the Attorney General would not have given the District Court jurisdiction over the Amended Complaint herein. As this Court stated in McNeil v. United States, petitioner would have had to file a new complaint if her refilled claim was denied by the Justice Department.

The ruling in the District Court prevented the petitioner from following the procedure dictated by this Court in McNeil v. United States.

B. THE DISTRICT COURT LACKED SUFFICIENT EVIDENCE TO RULE THAT PETITIONER'S CLAIM WAS TIME-BARRED ON MAY 16, 2000

Title 28, United States Code, section 2401(b) states a tort claim against the Unites States shall be forever barred unless it is presented in writing to the

appropriate Federal Agency within two years after such claim accrues.

Defendant argued that petitioner's claim was time-barred because the injury occurred on April 19, 1978 when the radioactive chip was implanted behind her left ear. However, petitioner has alleged in her Amended Complaint that the implantation was accomplished without her consent or knowledge. A claim accrues when the claimant knows or reasonably should have known both the existence and cause of the injury. (United States v. Kubrick, 444 U.S. 111, 121-123; Rosales v. United States, 824 F.2d 799, 802 (9th Cir. 1987).) Before the petitioner became aware of her injuries and the cause of them, she was in no position to know who caused her injuries. (Slaaten v. United States, 990 F.2d 1038, 1041 (1993); Osborn v. United States, 990 F.2d 724 (1990).)

Therefore, in medical malpractice cases, when the statue of limitation period begins to run is a fact question which the court must determine, since, if the petitioner fails to sue within the period of limitations, the court is deprived of jurisdiction to entertain the action. (UOP v. United States 99 F.3d 344, 347 (9th Cir. 1996).) And, if the defendant thinks the court lacks jurisdiction due to the statue of limitations, the proper course is to request an evidentiary hearing on the issue as to when the period of accrual began to run, if the issue is not clear from the pleadings in the case. (Crawford v. United States, 796 F.2d 924, 928 (1986); Osborn v. United States, Supra, at 730; Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.).) No such evidentiary hearing was held in this case.

The petitioner alleged in her Amended Complaint that she did not become aware of who had caused her

injuries until 1998 and that on August 21, 1998, she mailed a Form 95 to the Department of Justice claiming damages for her injuries. The evidence before the District Court only stated that sometime from January 1, 1998 and August 21, 1998, petitioner had become aware of the cause of her injuries and who had caused them. The evidence did not support a determination that petitioner's claim was time-barred on May 16, 2000.

As the exact date upon which petitioner became aware of the cause of her injury and who had caused the injuries, the District Court lacked sufficient evidence to rule that petitioner's claim was time-barred. Furthermore, a determination that the period of limitation has run is treated as a decision upon the merits of a case. (In re Marino, 213 B.R. 846, 852 (9th Cir. 1997); Criales v. American Airlines, Inc., 105 F.3d 93, 96 (2nd Cir. 1997); Guidry v. Bank of LaPlace, 954 F.2d 278, 287 (5th Cir. 1992).) The District Court lacked jurisdiction to rule upon the limitation issue because it lacked jurisdiction to proceed to the merits of the case since the petitioner had not presented her claim to the proper Federal Agency prior to filing her Amended Complaint.

B. **THE DISMISSAL OF PETITIONER'S AMENDED COMPLAINT WITH PREJUDICE DENIED PETITIONER PROCEDURE DUE PROCESS**

Fundamental principles of fairness and constitutionally protected procedure due process rights were violated in this case by the dismissal of petitioner's Amended Complaint with prejudice. The petitioner was denied her rights to follow the dictates of this Court as expressed in McNeil v. United States, Supra, which gave her the right to refile her claim with the Attorney General after her

claim herein had been dismissed for lack of jurisdiction due to her failure to properly present her claim to the Attorney General prior to filing her Amended Complaint herein. The District Court's with prejudice ruling denied petitioner that right, and thereby forever denied to her the right to be heard on merits of her case.

In Board of Regents, 408 U.S. 564, this Court stated that an interested party must have an entitlement to the benefit being denied. Here the entitlement to a certain procedural due process has been affirmed by this Court. Petitioner is entitled to that procedural due process, but has been denied it by the lower courts.

The right to due process is conferred by constitutional guarantee. (Vitek v. Jones, 445 U.S.480 (1980). In Matthew v. Eldridge, 424 U.S. 319 (1976) this Court stated that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of criminal conviction, is a principle basic to our society. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

To some the allegations of the petitioner in her Amended Complaint are far fetched and border on the realm of fantasy. However, the articles printed on the periodical called "WIRED", February 2000 issue, is confirmation to the exact same experimentation occurring with humans at this time. Whether or not the United States Government has carried on such experimentation with humans without their knowledge and consent is of far

reaching consequences to our present and future society. And, if it has, woe be unto us! This case seeks to give us the answer to that explosive question. For it involves a violation of our rights as citizens of this nation so fundamental and far reaching as to shake the very freedom upon which this nation has survived to this day and question its survival as we know it today. Now is the meaningful time to have petitioner's claim heard in a forum dedicated to truth and justice.

In Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708, this court stated that "due Process" is meant, one which, following the forms of law, is the appropriate to the case, and just to the parties to be affected; that it must be pursued in the ordinary mode prescribed by the law; that it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The with prejudice dismissal of petitioner's Amended Complaint by the District Court did not follow the law appropriate to this case, was not just to petitioner and robs her of the opportunity to be heard.

Questions of due process are not to be treated "narrowly or pendantly, in slavery to forms and phrases." (Pearson v. McGraw, 308 U.S. 313, 318 (1939).) A weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. (Smith v. Organ. Of Foster Families For E. & Reform), 431 U.S. 816, 841.)

The Federal Tort Claim Act is remedial and should be liberally construed to grant the relief

contemplated by Congress. (Kielwien v. United States, 540 F.2d 676, 681 (4th Cir. 1976 Cert.Den.).) Congress used neither intricate nor restrictive language in waiving the government's sovereign immunity. (United States v. Muniz, 374 U.S. 150, 152.) It is clear that the District Court did not observe the laws nor its interpretations by the other Federal Courts when it dismissed with prejudice petitioner's Amended Complaint for lack of jurisdiction and thereby denied petitioner procedural due process.

CONCLUSION

For the reasons, points and authorities herein presented, this Court should grant certiorari allowing petitioner her rightful opportunity to seek justice for the injuries she has suffered.

Dated: August 20, 2001

|s| Barbara Ann Johnson
BARBARA ANN JOHNSON
Petitioner
In Pro Se

APPENDIX

App. 1
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Barbara Ann Johnson Plaintiff-Appellant	)	No. 00-56010
	)	D.C. No.
v.	)	CV-99-01173-NAJ
United States of America Defendant-Appellee,	)	MEMORANDUM*

Appeal from the United States District Court
For the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Submitted April 9, 2001
Filed April 18, 2001

Before: CANBY, KOZINSKI, and RYMER, Circuit Judges

Barbara Ann Johnson appeals pro se the district court's order dismissing with prejudice her complaint alleging claims under 28 U.S.C. § 2671, the Federal Tort Claims Act, for lack of personal and subject matter jurisdiction and insufficiency of service of process. We have jurisdiction under 28 U.S.C. § 1291, and we affirm

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P. 34(a)(2).

for the reasons stated in the district court's order filed on May 15, 2000.

To the extent that Johnson argues that the district court abused its discretion by failing to afford her an opportunity to amend her complaint, the argument lacks merit because amendment to correct the jurisdictional deficiencies would be futile.
See Lopez v. Smith, 203 F.3d 1122, 1130. (9th Cir. 2000).

AFFIRMED.

APP. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA ANN JOHNSON, Plaintiff,	) Case No.) 99-CV-1173-J(JFS)
vs.	)
UNITED STATES OF AMERICA, Defendant.	)**ORDER**)**GRANTING**)**DEFENDANT'S**)**MOTION TO**)**DISMISS**
	) Filed May 16, 2000

This matter comes before the Court on Defendant USA's motion to dismiss Plaintiff Barbara Ann Johnson' Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(5), and 12(b)(6). For the reasons set forth below, the Court GRANTS Defendant's motion to dismiss with PREJUDICE.

BACKGROUND

On June 8, 1999, Plaintiff Barbara Ann Johnson filed her original complaint for damages under the Federal Tort Claims Act ("FTCA"). Plaintiff alleged that Defendants United States of America and the Department of Justice implanted "a radioactive chip in and behind the left ear of plaintiff, which now sends code pulses to scanners monitored by the United States intelligence community as part of defendant's experiments using humans as guinea pigs." (Compl. At ¶6).

On February 23, 2000, the Court dismissed Plaintiff's original complaint. The Court held that the Department of Justice was not a proper Defendant in an

action under the FTCA and dismissed the Department of Justice with prejudice. Additionally, the Court dismissed all claims against the United States for failure to properly serve the United States and for failure to exhaust administrative requirements. The Court granted Plaintiff leave to amend her complaint in the event that she could establish (1) good cause for the delay in serving the United States with the complaint and (2) that the United States Attorney General had in fact received a copy of her claim as per the exhaustion requirements under the FTCA.

On March 23, 2000, Plaintiff filed an Amended Complaint which deleted the Department of Justice as a Defendant and elaborated on the date of her awareness of the injury, but otherwise maintained the identical allegations. On April 7, 2000, Defendant filed the instant motion to dismiss the Amended Complaint arguing that Plaintiff had failed to remedy the effects set forth in the Court's order dismissing the original complaint.

DISCUSSION

A. Legal Standard

The Court incorporates by reference the legal standard it set forth in its order dismissing the original complaint dated March 23, 2000.

B. Jurisdictional Defects in Plaintiff's Amended Complaint

Defendant urges the Court to dismiss Plaintiff's Amended Complaint because Plaintiff has failed to remedy the jurisdictional defects that the Court delineated in its order dismissing the original complaint. Specifically, Defendant argues that Plaintiff has failed to perfect service on the United States in compliance with Rule 4 of the Federal Rules of Civil Procedure and that Plaintiff has

failed to adequately establish administrative exhaustion. The Court will address each argument in turn.

1. Improper Service

To effect proper service on the United States, a party must serve the United States attorney for the district in which the action is brought and send a copy of the summons and complaint by registered mail to the Attorney General of the United States. Fed.R.Civ.P.4 (1)(a)-(b). Moreover, service must effectuated within 120 days of the filing of the complaint. Fed.R.Civ.P.4 (m).

In the courts order dismissing the original complaint, the Court noted that Plaintiff served the United States Attorney's Office over 150 days after filing the complaint in district court. Accordingly, the Court directed Plaintiff to demonstrate "good cause" for the delay in order for the Court to credit the service as proper. The amended complaint, however, proffers no explanation for the untimely service. Additionally, Plaintiff has failed to serve the Attorney General of the United States as required under the Rule 4(i)(B). These defects constitute improper service and divest this Court of personal jurisdiction over the Defendant. Defendant's motion to dismiss under Federal Rules of Civil Procedure 12(b)(5) is therefore GRANTED

2. Administrative Exhaustion

A plaintiff may not file and FTCA claim in federal district court before filing the claim with the appropriate federal agency. 28 U.S.C. § 2675(a). Upon final denial of the claim or six months after filing the claim, plaintiff may file an action in the district court. Id. Failure to file an administrative claim divests the district court of subject matter jurisdiction to hear plaintiff's action. "Exhaustion of the claim procedures established under the Act is a prerequisite to district court action." Burns v. United States, 764 F.2d 722, 724 (9th Cir. 1985).

An administrative claim is properly filed only when a federal agency receives "an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages...for...personal injury...alleged to have occurred by reason of the incident." 28 C.F.R. § 14.2. Because filing with the appropriate agency is a jurisdictional requirement, failure to comply creates a jurisdictional defect. 28 U.S.C.§2675(a); see Payne v. United States, 10 F.Supp.2d 203, 204 (N.D.N.Y. 1998) (citing Keene Corp. v. United States, 700 F.2d 836, 841 (2d. Cir. 1983). Thus, Plaintiff bears the burden of showing her administrative claim was timely received in order to show that the Court has subject matter jurisdiction over this action. See Hexom v. Oregon Dept. of Transp., 177 F.3d 1134, 1135 (9th Cir. 1999) (citing Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp., 594F.2d 730, 733 (9th Cir. 1979). Because courts must strictly interpret administrative claims provisions of the FTCA, Caldwalder v. United States, 45 F.3d 297, 230 (9th Cir. 1995), the Court may not waive this jurisdictional requirement. See Blaine v. United States. 552 F.2d 289, 291 (9th Cir. 1977).

In its order dismissing Plaintiff's original complaint, the Court found that Plaintiff's evidence in the form of a declaration from an individual who prepared her claim and allegedly mailed it to the proper agency was insufficient to establish that the federal agency actually *received* the claim. Accordingly, the Court dismissed the complaint and granted Plaintiff leave to amend in the event that she had additional evidence that "conclusively established[d] that the federal agency did in fact receive her administrative claim." (Order, dated Feb. 23, 2000 at 6).

Plaintiff's amended complaint contains a new declaration from Arlene Ransom, which further elaborates

on her efforts assumptions when mailing the administrative claim to Janet Reno, United States Attorney General. (Amended Compl., Exh. 1). However, Plaintiff does not include a certified mail receipt or any other evidence with demonstrated indicia of reliability that the Attorney General actually *received* the claim. Instead, Plaintiff appears to argue that both California and Federal law support the position that proof of mailing creates a rebuttable presumption of receipt. (Pl. Opp. At 3).

As a threshold matter, the Ninth Circuit has definitively spoken on the issue of what law Governs the jurisdictional question of "receipt" in this context: "Congress has specifically provided a federal limitations period in 28 U.S.C. §§ 2675 (a) and 2401 (b), and the interpretation of that limitation is matter of federal law. "Bailey v. United States, 642 F.2d 344, 347 n.1 (9th Cir.1981). Therefore, Plaintiff's reliance on California case law is inapposite. The only federal case that Plaintiff cites for this presumption is Cordaro v. Lusardi, 354 F.Supp. 1147 (S.D.N.Y. 1973) which the Ninth Circuit declined to recognize in Bailey. Id at 347. In Bailey, the Ninth Circuit avoided any conflict between the presumption on which Plaintiff relies and the strict interpretation employed with 28 U.S.C. §2675(a), since the presumption is rebuttable and the government had provided affidavits, which sufficiently rebutted the presumption. Id. The same result must follow here where Defendant has provided two declarations, which affirmatively aver that the Attorney General's Office never received Plaintiff's claim. See, Smith Decl, Exh.A., Def's Motion to dismiss Original Compl.; Atkins Decl., Exh.B, Def's Motion to Dismiss Original Compl. Accordingly, Plaintiff has failed to establish that the Attorney General's office received her claim and she has therefore failed to exhaust her administrative requirements. Since Plaintiff

has failed to demonstrate administrative exhaustion, the Court lacks subject matter jurisdiction. Hence, the Court GRANTS Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

C. Leave to Amend

Adjudication on the merits is always preferable to dismissal of a claim for failure to comply with procedure requirements. Foman v. Davis, 371 U.S. 178, 181 (1962) ("It is to late in the day and entirely contrary to the spirit of the federal Rules of Civil Procedure for decision on the merits to be avoided on the basis of such mere technicalities.") Accordingly, leave to amend should be denied only if the court determines that "allegations or other facts consistent with the challenged pleading could not possibly cure the defect." Schreiber Distrib. Co. v. Serv-Well Furniture Co. 806 F.2d 1393, 1401 (9thCir. 1986).

The district court, however, has broad discretions in determining when to grant leave to amend, particularly when leave to amend has previously been granted. Ascon. Properties. Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.1989) (" The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.") While the Court must heed Rule 15(a)'s mandate that "leave be freely given when justice so requires," the Court is authorized to weigh the following factors, when deciding whether to grant leave to amend: (1) undue delay, (2) bad faith, (3) repeated failure to cure deficiencies by previous amendment, and (4) prejudice. Foman, 371 U.S. at 182; see also Allen v. Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

Here, Plaintiff has already been granted one opportunity to amend her complaint; the Court clearly set forth the nature of the defects in her original complaint and

the steps that Plaintiff would need to take in order to remedy the complaint. Plaintiff, however, never attempted to remedy the service defects and, despite elaborate discussion on the "receipt" requirement, failed to provide the type of evidence that would establish administrative exhaustion. Therefore, the Court finds that Plaintiff has failed to cure deficiencies by previous amendment. Additionally, the Court finds that granting Plaintiff leave to amend would prejudice Defendant; defendant has already spent valuable time litigating this complaint and it is unclear if any additional amendments could possibly salvage Plaintiff's complaint. Defendant would be prejudiced of forced to file an additional motion to dismiss if Plaintiff's Second-Amended Complaint fails to remedy the jurisdictional issues. Moreover, Plaintiff's actions are unduly delaying this litigation. Plaintiff should have timely served the Defendants and Plaintiff should have re-filed her claim with the Attorney General if, in fact, the statue of limitations has not run on her claim as she now asserts. Finally, the Court is skeptical that any amendment could possibly save Plaintiff's claim since it seems likely that she is time-barred from pursuing this claim and it is evident that she has no certified receipt from mailing the claim to the Attorney General. In light of these factors, the Court GRANTS Defendant's motion to dismiss with PREJUDICE.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** defendant's motion to dismiss the complaint with **PREJUDICE.**

IT IS SO ORDERED.

May 15, 2000
DATE

|s| Napoleon A. Jones, Jr.
NAPOLEON A. JONES
District Judge

APP. 10

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Barbara Ann Johnson	)	No. 00-56010
Plaintiff-Appellant	)	
	)	D.C. #
v.	)	CV-99-01173-NAJ
	)	Southern California
United States of America	)	(San Diego)
Defendant-Appellee,	)	
	)	ORDER

FILED: July 12, 2001

Before: CANBY, KOZINSKI, and RYMER, Circuit Judges.

Judges Kozinski and Rymer vote to deny the petition for rehearing en banc, and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P.35.

The petition for rehearing en banc is denied.

No further filings shall be accepted in this closed appeal.

BARBARA ANN JOHNSON
9255 Magnolia Avenue, #17
Santee, California 92071
Telephone: (619) 448 – 3673

Attorney for Plaintiff
BARBARA ANN JOHNSON
In Pro Se

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Barbara Ann Johnson	) Case No.:
Plaintiff-Appellant	) 99-CV-1173-J (JFS)
	) AMENDED
v.	) COMPLAINT FOR
	) DAMAGES DUE
United States of America	) TO CONSPIRACY
Defendant-Appellee,	) AND PERSONAL
_____	) INJURY
	Filed: March 23, 2000

Plaintiff alleges:

1. This action arises under the Federal Tort Claims Act, section 2671 through 2680 of Title 28 of the United States Code. This court is vested with jurisdiction pursuant to section 1346 (b) of Title 28 of the United States Code.

2. Plaintiff is an elderly single woman who resides at 9255 Magnolia Avenue, #17, Santee, California 92071, which is within the Southern District of California. The acts and omissions hereinafter occurred within the Southern District of California.

3. Defendant, UNITED STATES OF AMERICA, by and through REES STALEY CLINIC, MERCY

HOSPITAL in San Diego, California, operated medical services for military personnel and their friends, and held itself out to use that degree of care, skill, diligence, and attention used by hospitals generally in the community in the care and treatment of patients. At all times relevant herein, defendant took part in the above-indicated hospital's employment of certain doctors, nurses, interns, residents, student nurses, nurses aids and other hospital personnel over which defendant exercised control and supervision, with the right to employ and discharge such employees.

4. Dr. Richard Duback practiced medicine at the above-mentioned clinic and was an employee of defendant, acting within the scope of his employment.

5. At all times relevant herein, there existed between the physician, Dr. Richard Duback, and the plaintiff the relationship of physician-patient.

6. On or before April 19, 1978, Chief James Allen Cantley, of the United States Navy, conspired with Dr. Richard Duback, Reese Stanley Clinic and the defendant to implant a radioactive chip in and behind the left ear of plaintiff, which now sends code pulses to scanners monitored by the United States intelligence community as part of defendant's experiments using humans as guinea pigs.

7. ~~Plain~~tiff did not give permission for the implant operation, nor was she aware at the time that radioactive ship was being implanted, nor was she aware of the implant at the time of the operation.

8. The above-described conspiracy and the resulting conduct of defendant and its co-conspirators was willful and wanton and carried our with the reckless disregard for plaintiff's rights, safety and well-being, and without warning to plaintiff or any attempt in any way to

avert injury to plaintiff and done with full knowledge that by the above-described operation, defendant was illegally and unreasonably exposing plaintiff to probable serious harm; and defendant thereby wantonly and recklessly disregarded the probable consequences to plaintiff by the above-described operation.

9. As a result of the carelessness, negligence, medical malpractice and the violation of plaintiff's rights, plaintiff has suffered damage to her central nervous system, damage to her liver, insomnia, diarrhea, headaches, earaches, dizziness, over sensitivity to light, vomiting, stomach pain and radioactive poisoning.

10. It was not until 1998 that plaintiff became aware that her physical problems were the result of the operation performed by Dr. Richard Duback at Reese Stanley Clinic at Mercy Hospital on April 19, 1978.

11. Therefore, on August 26, 1998, plaintiff submitted a claim based on the above-mentioned allegations in the amount of $1,000,000,000. to Janet Reno, United States Attorney General, Department of Justice. A copy of plaintiff's CLAIM FOR DAMAGE INJURY OR DEATH, Form 95, is attached hereto as Exhibit "A" and by reference made a part hereof as if fully set forth herein. A DECLARATION OF ARLENE RANSOM is also attached hereto as Exhibit "B" which attests to the mailing of plaintiff's CLAIM FOR DAMAGE INJURY OR DEATH, Form 95 by the United States Mail, and by reference is made a part hereof as if fully set forth herein.

12. As of the date of this amended complaint, the DEPARTMENT OF JUSTICE had neither accepted nor rejected plaintiff's claim and pursuant to 28 United States Code, section 2675 (a), plaintiff elects to consider the failure to act as a final denial of her claim.

WHEREFORE, plaintiff requests judgment

Against the defendant UNITED STATES OF AMERICA as follows:

1. Damages in the amount of $1,000,000,000;
2. Plaintiff's costs on this action; and
3. Such other and further relief as the Court may Deem just and proper.

March 17, 2000
DATE

|s| Barbara Ann Johnson
BARBARA ANN JOHNSON
Plaintiff, In Pro Se

APP. 15

CLAIM FOR DAMAGE, INJURY, OR DEATH

1. SUMBIT TO: Janet Reno, United States Attorney General, Department of Justice,
   950 Pennsylvania Avenue
   Washington, D.C., 20530-0001
2. NAME AND ADDRESS OF CLAIMANT:
   Barbara Ann Johnson
   9255 Magnolia Avenue, # 17
   Santee, California 92071
3. TYPE OF EMPLOYMENT: None
4. AGE: 62
5. MARITAL STATUS: Single
6. NAME AND ADDRESS OF SPOUSE, IF ANY: None
7. PLACE OF ACCIDENT:
   Rees Staley Clinic, Mercy Hospital
   San Diego, California
8. DATE AND DAY OF ACCIDENT:
   April 19, 1978
9. TIME: N/A
10. AMOUNT OF CLAIM (in dollars): $1,000,000,000
11. DESCRIPTION OF ACCIDENT: On April 19, 1978, Chief James Allen Cantley USN, conspired with the United States Government to implant a radioactive chip in and behind the left ear of the claimant, which sends code pulses to scanners monitored by the United States Intelligence community as part of experiments using humans as guinea pigs. Claimant was not aware of the implant at the time of operation.
12. PROPERTY DAMAGE: None

13. PERSONAL INJURY: As a result of the radioactive implant, claimant now suffers damage to her central nervous system, damage to her liver, insomnia, diarrhea, headaches, earaches, dizziness, over sensitivity to light, vomiting, stomach pains, and radioactive poising.
14. WITNESSES:

Name and Address:

Dr. Richard Duback, Reese Staley Clinic
Mercy Hospital
Dr. Richard Mills, 6244 El Cajon Blvd,
El Cajon, CA.
Susan Hoolighan, Alvarado Hospital, San Diego, CA.
Dr. Jan Karel, 2805 Adrian Street, San Diego, CA.

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

15. SIGNATURE OF CLAIMANT:
|s| Barbara Ann Johnson
15. DATE OF CLAIM: August 21, 1998

BARBARA ANN JOHNSON v. UNITED STATES OF AMERICA

Case No. 99-CV-1173-J (JFS)

DECLARATION OF ARLENE RANSON

I, ARLENE RANSON, do hereby declare:

1. I am over the age of 18 years and not a party to the herein action. I am employed in the County of San Diego, California and my business address is 8685 North Magnolia Avenue, Suit "C", Santee, California.

2. On or about August 26, 1998, I was engaged by BARBARA ANN JOHNSON to mail her CLAIM FOR DAMAGE, INJURY, OR DEATH, Standard Form 95, to the United States Attorney General, JANET RENO, in Washington, D.C. As I did not know the exact street address for the Department of Justice in Washington, D.C., I called the office of the U.S. Attorney in San Diego, California, and was told to mail the claim form to 950 Pennsylvania Avenue, Washington, D.C. 20530-0001.

3. Accordingly, I prepared a letter of transmittal to transmit the claim for 95 to:

JANET RENO
United States Attorney General
Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

In the letter of transmittal I requested that BARBARA ANN JOHNSON'S CLAIM FOR DAMAGE, INJURY OR DEATH be filed, and that conformed copies be returned to me in the enclosed self-addressed stamped envelope (SASE).

4. I then made copies of the CLAIM FOR DAMAGE, INJURY, OR DEATH, Standard Form 95, enclosed the original and two copies in an envelope with self-addressed stamped envelope also enclosed, addressed as indicated above, and

delivered that same envelope, with first-class postage fully prepaid thereon, to the United States Post Office in Santee, California, on August 26, 1998.

5. I made no attempt to remail the claim form to JANET RENO, as I am fully aware that according to California State law, a letter mailed by U.S. Mail is deemed a letter received, unless that letter is returned by the U.S. Post Office. As the above-mentioned letter was not returned, I assumed that the letter was delivered and received as addressed. A copy of said letter of transmittal and the CLAIM FOR DAMAGE, INJURY, OR DEATH, standard Form 95, is attached hereto as Exhibit 1, and by reference made a part hereof as if fully set forth herein.

I declare under penalty of perjury that the foregoing is true and correct, and that if called upon to testify, I would testify to the same.

March 17, 2000
DATE

|s| Arlene A. Ranson
ARLENE A. RANSON

APP. 19

PUBLIC PARALEGAL SERVICES
MARILYN A. PARKER, J.D.
8685 N. MAGNOLIA AVENUE, SUITE C
SANTEE, CALIFORNIA 92071
(619) 258-2089

August 26, 1998

JANET RENO
UNITED STATES ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20530-0001

PLEASE FILE AND CONFORM THE ATTACHED CLAIM FOR DAMAGE, INJURY, OR DEATH. A SASE IS ENCLOSED FOR THE RETURN OF THE CONFORMED COPIES.

SINCERELY,
|S| Arlene A. Ranson
ARLENE A. RANSON

Exhibit 1

APP. 20

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BARBARA ANN JOHNSON, Plaintiff, vs. UNTED STATES OF AMERICA, Defendant	Case No.: No. 99-CV-1173-J (JFS) Date: May 15, 2000 Time: 10:30 a.m. Ctrm: 12 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT ORAL ARGUMENT NOT REQUIRED

I. INTRODUCTION

On February 23, 2000, the Court dismissed Plaintiff's original complaint. The Court also granted Plaintiff 30 days to file an amended complaint in the event that she is able to allege facts, which would correct several fundamental defects that deprive the Court of subject matter jurisdiction over this action and personal

jurisdiction over the United States. Plaintiff filed an amended complaint on March 23, 2000. By this motion, the United States moves to dismiss Plaintiff's amended complaint, pursuant to Rules 4(i), 4(m), 12(b)(1)[1] 12(b)(2) 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure, because it fails to remedy the defects that previously were identified by the Court.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 8, 1999, Plaintiff filed a complaint (the "Original Complaint") seeking to recover $ 1,000,000,000 from the United States of America and the United States Department of Justice ("DOJ") based on an alleged conspiracy "to implant a radioactive chip in and behind the left ear of Plaintiff, which now sends code impulses to scanners monitored by the United States intelligence community as part of experiments using humans as guinea pigs." Original complaint ¶6. The Original Complaint alleged that the United States and DOJ "operated [a] medical service for military personnel and their friends" at the Rees Staley Clinic, Mercy Hospital, in San Diego, California ("the Clinic"), and that Dr. Richard Duback (i.e., a doctor who allegedly practiced at the Clinic and was employed by the United States and/or DOJ), United States Navy Chief James Allen Cantley, the United States, and DOJ all conspired to implant the radioactive chip behind Plaintiff's left ear without her knowledge or consent during an operation that allegedly took place at the Clinic

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[1] The Court may consider matters outside the pleadings in ruling on the motion to dismiss the Complaint under Rule 12(b)(1). See Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983).

on or about April 19, 1978. Id. ¶¶ 3, 4, 6. Based on these factual allegations Plaintiff alleged negligence, medical malpractice, and personal injury claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674-2680 (the "FTCA"),[2] and unspecified "violations of [her]...civil rights." Id. ¶ 1, 7, 8, 10, 11.

On January 10, 2000, the United States and DOJ filed a motion to dismiss the Original Complaint. In that motion, the United and DOJ argued that dismissal was required because: (i) the United States is the only proper defendant in a suit under the FTCA; (ii) Plaintiff failed to file an administrative claim under FTCA; (iii) Plaintiff's FTCA claims are timed-barred; (iv) the United States has not waived its sovereign immunity for alleged constitutional violations; (v) Plaintiff's constitutional claim are timed-barred; and (vi) the Court lacks personal jurisdiction over the United States and DOJ. See Defendants' Memorandum Of Points And Authorities In Support Of Motion To Dismiss Complaint ("Defendants' Memorandum") at 1-7. The United States and DOJ also argued that the dismissal should be without leave to

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[2] Plaintiff's demand for 1,000,000,000 can only be seen as a demand for punitive damages. Punitive damages, however, are not available in an action against the United States under the FTCA. SEE 28 U.S.C. §2674.

amend.[3] Id. At 1-2.

On February 23, 2000, the Court issued a written order that dismissed the Original Complaint (the "Dismissal Order"). Specifically, the Court: (i) dismissed all claims against DOJ with prejudice because the United States is the only proper defendant under the FTCA and because constitutional claims are not cognizable under the FTCA (Dismissal Order at 4, 7); (ii) dismissed all constitutional claims against the United States with Prejudice because such claims are not cognizable under the FTCA (Id.) at 7); and (iii) dismissed the FTCA claims against the United States without prejudice because Plaintiff failed to present evidence that the relevant federal agency actually received her administrative claim in a timely manner (Id.at 5-6), because the FTCA claims, as pled, are time-barred (Order at 6-7), and because Plaintiff

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[3] The United States and DOJ initially argued that the Original Complaint must be dismissed without leave to amend because: (i) Plaintiff's factual allegations are frivolous; (ii) Plaintiff cannot allege any credible facts to support her claims; (iii) the Court lacks jurisdiction over the subject matter of the action; and (iv) Plaintiff's claims are time-barred. Defendant's Memorandum at 1-2. In light of the theoretical questions concerning the accrual date and compliance with the applicable statue of limitations that might be raised in the future if Plaintiff were to prove that she presented an administrative claim that actually was received by the relevant federal agency, the United States and DOJ modified their position on this point so that their request for dismissal with prejudice was based on the fact that the core allegation in this case is frivolous and the fact that Plaintiff cannot allege any credible facts to support her claims. See Defendant's Reply Memorandum Of Points and Authorities In Support Of Motion To Dismiss Complaint ("Defendant's Reply Memorandum") at 3-4.

failed to serve the Original Complaint on the United States Attorney in a timely manner (Id. At 7-8).[4] The Court also granted Plaintiff 30 days to file an amended complaint that would reassert her FTCA claims against the United States, provided that: (i) " she has further evidence that conclusively established that the federal agency did in fact *receive* her administrative claim" (Id. At 6); and (ii) "she can demonstrate good cause for the [thirty-day] delay" in serving the United States Attorney (Id. At 8). Finally, although the Court properly concluded that it is not necessary to calculate the accrual date for Plaintiff's FTCA claims or assess the extent to which Plaintiff complied with the applicable statue of limitations unless and until Plaintiff can establish that she presented an administrative claim that actually was received by the proper federal agency, the court explained that, "in the event that [Plaintiff] can successfully amend her complaint to show compliance with the [administrative claim] filing requirement," Plaintiff also may amend her complaint to allege additional facts concerning the accrual date which would establish that this action was filed in compliance with the applicable statue of limitations. Id. At 6-7 and n.3.

On February 23, 2000, the United States and DOJ filed and Ex Parte Notice Of Information Concerning Plaintiff's "Pro Se" Status (the defendants' Ex Parte Notice").

On or about February 28, 2000, Plaintiff filed a "Response to Defendants' Ex Parte Notice Re Information

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[4] The Courts Dismissal Order did not address Defendant's argument that Plaintiff's constitutional claims are time-barred or that portion of Defendant's argument that the Court lacks personal jurisdiction which was based on the fact that Plaintiff failed to serve the Attorney General of the United States. See Defendants' Memorandum at 6-7.

Concerning Pro Se Status of Barbara Ann Johnson" ("Plaintiff's Response To Defendants' Ex Parte Notice").

On March 23, 2000, Plaintiff filed an amended complaint (the "Amended Complaint"). The Amended Complaint deletes all claims against DOJ, deletes the constitutional claims against the United States, and reasserts the FTCA claims against the United States. The factual allegations and relief sought in the Amended Complaint are essentially identical to the factual allegations and relief sought in the Original Complaint. See Amended Complaint at ¶¶ 1-9, Prayer For Relief, Original Complaint at 1-8, Prayer For Relief. The only new factual allegation in the Amended Complaint is the assertion that "[I]t was not until 1998 that [P]laintiff became aware that her physical problems were the result of the operation...on April 19, 1978." Amended Complaint ¶ 10.

The Amended Complaint also is accompanied by a Declaration of Arlene Ranson dated March 17, 2000 (the "March 17 Ranson Declaration'). See Amended Complaint ¶ 11 and Exhibit "B". The March 17 Ranson Declaration reaffirms the basic information contained in the Declaration of Arlene Ranson dated February 3, 2000 (the "February 3 Ranson Declaration") that Plaintiffs' previously filed as an exhibit to her opposition to defendants' motion to dismiss the Original Complaint (i.e., that Ranson allegedly mailed Plaintiff administrative claim to the Attorney General of the United States by first class mail on or about August 26, 1998), explains that Ranson obtained the Attorney General's address from an unidentified individual at the United States Attorney's Office, provides additional details concerning the circumstances under which Ranson allegedly mailed Plaintiff's administrative claim to the Attorney general, and states that Ranson did not attempt to re-mail Plaintiff's administrative claim to the Attorney

General because she understood that, under California law, a letter mailed by U.S. Mail - allegedly is "deemed...received" unless it is returned to the sender and because Plaintiff's administrative claim was not returned by the United States Postal Service. See March 17 Ranson Declaration at ¶¶ 2-5 The March 17 Ranson Declaration is not accompanied by any proof that Plaintiff's administrative claim was actually received by the Attorney General.

III. ARGUMENT

A. THE AMENDED COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF HAS NOT ESTABLISHED THAT HER ADMINISTRATIVE CLIAM WAS RECEIVED BY THE RELEVANT FEDERAL AGENCY

The Court's Dismissal Order granted Plaintiff permission to file an amended complaint "in the event that she has further evidence that conclusively establishes that the federal agency did in fact *receive* her administrative claim." Dismissal Order at 6. As demonstrated below, Plaintiff's Amended Complaint must be dismissed because it fails to satisfy this requirement.

The Amended Complaint and the March 17 Ranson declaration do not contain any allegations or evidence which would establish that Plaintiff's administrative claim was actually received by the federal agency. That fact alone is sufficient to require dismissal of the Amended Complaint. In addition, to the extent that the March 17 Ranson Declaration restates Ranson's prior allegation that she sent Plaintiff's administrative claim to the Attorney General by first class mail and provides additional details

concerning the circumstances under which Ranson allegedly mailed Plaintiff's administrative claim (see March 17 Ranson Declaration at ¶¶ 2-4), such allegations are irrelevant and must be disregarded because they do not constitute evidence (such as a certified mail receipt) that Plaintiff's administrative claim was received by the relevant federal agency. See Dismissal Order at 5-6; defendants' Reply Memorandum at 1-2. Ranson's allegations that she obtained the Attorney General's mailing address from an unidentified individual at the United States Attorney's Office also is irrelevant and must be disregarded because, once again, it is not accompanied by evidence that Plaintiff's administrative claim was actually received by the Attorney General at that address.[5] Similarly, Ranson's statement that she did not attempt to re-mail Plaintiff's administrative claim to the Attorney General because she understood that, under California law, a letter mailed by U.S. Mail is "deemed...received" unless is returned to the sender and because Plaintiff's administrative claim was not returned to the sender and because Plaintiff's administrative claim was not returned by the United States Postal Service, March 17 Ranson Declaration at ¶ 5, is irrelevant and must be disregarded because the fact that Ranson was misinformed about the law governing presentation of FTCA administrative claims to the relevant federal agency does

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[5] On March 28, 2000, the undersigned Assistant U.S. Attorney contacted a responsible DOJ employee in Washington, D.C. by telephone and was advised that the mailing address contained in the March 17 Ranson Declaration is a valid mailing address for the Attorney General.

not alter the fact that Plaintiff's administrative claim was not received by the relevant federal agency.[6] Therefore, the Amended Complaint must be dismissed because Plaintiff failed to establish that her administrative claim was received by the relevant federal agency.

B. PLAINTIFF'S ALLEGATION THAT HER FTCA CAUSE OF ACTION DID NOT ACCRUE "UNTIL 1998" IS IRRELEVANT AND MUST BE DISREGARDED BECAUSE SHE HAS NOT ESTABLISHED THAT HER ADMINISTRATIVE CLAIM WAS RECEIVED BY THE RELEVANT FEDERAL AGENCY

The Court's Dismissal Order properly concluded that it is not necessary to calculate the accrual date for Plaintiff's FTCA claim or assess the extent to which Plaintiff complied with the applicable statue of limitations unless and until Plaintiff can establish that she presented an administrative claim that actually was received by the proper federal agency. Dismissal Order at 6-7 and n.3.[7]

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6 Ranson's purported summary of California law regarding presumption receipt of items that are sent through the mail is contradicted by the applicable federal judicial authorities, which make cleat that an FTCA administrative claim has not been properly presented until it is received by the relevant federal agency. SEE Defendants' reply Memorandum at 1-2; Dismissal Order at 5-6.

7 Although the Dismissal Order properly cites §2401 (b) for the general proposition that a tort suit under the FTCA is forever barred unless an administrative claim is presented to the relevant federal agency within two years after the cause of action accrued and the district court action is filed within six months after the date on which the final denial of the administrative claim was mailed to the plaintiff by certified mail, see Dismissal Order at 6 (line 2) to (line 7), the

Indeed, the Court's Dismissal Order contemplated that Plaintiff would only be permitted to amend her complaint to allege additional facts concerning the accrual date which would establish compliance with the applicable statute of limitations "in the event that [Plaintiff] can successfully amend her complaint to show compliance with the [administrative claim] filing requirements." Id. The discussion in Part III.A. above confirms that Plaintiff still has not established that her administrative claim was received by the relevant federal agency. For that reason, there is still no reason for the Court to calculate the accrual date for Plaintiff's FTCA cause of action or

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Court's analysis of the specific accrual date that Plaintiff would have to allege in order for this lawsuit to be timely (i.e., June 8, 1997 at the earliest) appears to be based on the premises that the district court action (which, in the instant case, was filed on June 8, 1999) must have been filed not more than two years after the date on which Plaintiff's cause of action accrued, see Dismissal Order at 7 (lines 6-9). The United States disagrees with this analysis for the following reasons: (i) the date on which Plaintiff filed her district court action is not relevant to the question whether she presented an administrative claim to the relevant federal agency within two years after her claim accrued; (ii) the only time it is necessary for a court to focus on the date on which a plaintiff filed her district court action is when it is considering the question whether the district court action was filed within six months after the date on which the agency mailed the final denial of the administrative claim to a plaintiff by certified mail; and (iii) as the Court noted in footnote 3 of the Dismissal Order, it is not necessary to even consider the accrual date for Plaintiff's FTCA claim or the timeliness of Plaintiff's district court action in the instant case, unless and until Plaintiff can show that she complied with the threshold requirement that she presented an administrative claim that actually was received by the relevant federal agency. See 28 U.S.C. § 2401 (b)

assess the extent to which Plaintiff has complied with the applicable statute of limitations. Therefore, Plaintiff's allegations concerning the date on which her FTCA cause of action accrued is irrelevant and must be disregarded by the Court.

C. THE AMENDED COMPLAINT IS STILL SUBJECT TO DISMISSAL FOR LACK OF PERSONAL JURISDICTION

The Court's Dismissal Order granted Plaintiff permission to file an Amended Complaint "in the event that she can demonstrate good cause for the [thirty-day] delay" in serving the United States Attorney. Dismissal Order at 8. Amended Complaint and the March 17 Ranson Declaration do not contain any allegations or evidence which would establish "good cause" for Plaintiff's failure to timely serve the United States Attorney. Therefore, this action is still subject to dismissal for lack of personal jurisdiction over the United States.[8]

D. THE DISMISSAL SHOULD BE WITHOUT FURTHER LEAVE TO AMEND

Plaintiff has represented that she is proceeding pro se and has asked this Court to grant her the favorable treatment

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[8] As noted above (see supra note 4), the Court's Dismissal Order did not address that portion of the United States and DOJ's motion to dismiss the Original Complaint, which was based on Plaintiff's failure to timely serve the Attorney General. Moreover, on March 28, 2000, the undersigned Assistant U.S. Attorney contacted a responsible DOJ employee in Washington, D.C. by telephone and was advised that the Attorney General still has not been served in this action. This defect continues to provide an additional ground for dismissal based on lack of personal jurisdiction over the United States.

that normally is afforded to pro se litigants.[9] The record reveals, however, that Plaintiff is not acting as a true pro se plaintiff and that she is not entitled to the special deference that normally is afforded to pro se litigants in this action. For example, the information contained in Defendants' Ex Parte Notice (including the accompanying exhibits) shows, among other things, that Plaintiff is receiving assistance from an attorney and other individuals (including a paralegal with a J.D. degree who is not licensed to practice law in California). In fact, Plaintiff has acknowledge that she "sought and obtained" advice from a member of the California State Bar "before effecting all filings in this case," that "[t]he documents filed in this case have all been prepared by paralegals working under the supervision of that attorney," and that Plaintiff "has paid for supervision of her litigation by a member of the State of California and has engaged paralegals to prepare her documents" in connection with this litigation. Plaintiff's Response to Defendants' Ex Parte Notice at 2. See also March 17 Ranson Declaration at ¶ 2-5. Therefore, even if the Court concludes that it is not necessary to make any further inquiries concerning the

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[9] As the Court will recall, an attorney entered a "special appearance" and addressed the Court on behalf of Plaintiff at the February 22, 2000 hearing on the United States' and DOJ's motion to dismiss the Original Complaint. The attorney stated that he does nor represent Plaintiff, that Plaintiff is proceeding pro se in this action, that the Court should consider Plaintiff's pro se status in ruling on the pending motion, and that the Court should give Plaintiff an opportunity to correct any technical problems that may exists in the Original Complaint by allowing her to file an amended complaint. In addition, all of the documents that Plaintiff has served on the United States in this action state that she is proceeding pro se.

issue that are raised by Defendants' Ex Parte Notice, [10]

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[10] Defendants' Ex Parte Notice informed the Court of certain facts which may raise the ghost writing and other concerns that were discussed by this Court in Ricotta v. State of California, 4 F.Supp.2d 961, 985-988 (S.D. Cal. 1998), and which also may raise concerns under Cal. Bus. & Prof. Code § 6125 ("[n]o person shall practice law in California unless the person is an active member of the State Bar."), Cal. Bus. & Prof. Code § 6126(a) (an individual may be guilty of a misdemeanor if he holds himself " out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar,"), and Rule 1-300 of the Rules of Professional Conduct of the State Bar of California (member of the California Bar "shall not aid any person or entity in the unauthorized practice of law."). Plaintiff's Response to Defendants' Ex Parte Notice argues that the assistance provided to Plaintiff in connection with the lawsuit does not raise the above-referenced concerns because such assistance is authorized by California Business & Professions Code § 6400, et seq. This argument lacks merit. Among other things, the statue cited by Plaintiff authorizes "legal document assistant[s]," as defined by Cal. Bus. & Prof. Code § 6400 (c), to provide "self-help service[s]," as defined by Cal. Bus. Prof. Code § 6400(d), under the circumstances set forth throughout the statue. Even if the non-attorneys who are assisting Plaintiff qualify as 'legal document assistants" – a point which the United States does not concede, see id. §§ 6400(c)(1); 6401 (b) – the statue specifically prohibits "legal document assistants" from providing most of the services that are being provided to Plaintiff in the instant case. See Id. §§ 6400(d) and (q); 6401.5; 6401.6; 6411; 6415. For example, although some of the assistance which has been

it is clear that Plaintiff's pleadings are not entitled to the special deference that normally is afforded to pro se litigants because she is not acting as a true pro se plaintiff in this action.[11]

The discussion in Parts III.A., III.B, and III.C. makes clear that the Amended Complaint must be dismissed because if fails to correct the fundamental defects that previously were identified by the Court. Although the Court might be inclined to dismiss the Amended Complaint without prejudice in light of the theoretical questions concerning the accrual date and compliance with the applicable statue of limitations that

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provided to Plaintiff arguably may qualify as the type of ministerial assistance that is authorized by these (e.g., mailing Plaintiff's administrative claim; serving documents), most of such assistance (e.g., drafting the Original and Amended Complaint, drafting the opposition papers that Plaintiff filed in response to the motion to dismiss the Original Complaint, drafting Plaintiff's Response to Defendants' Ex Parte Notice and drafting the interrogatories and document request that Plaintiff served on the United States) is beyond the scope of the statue. Under these circumstances, the statue, relied on by Plaintiff does not eliminate the potentials issues that are discussed in Defendants' Ex Parte Notice.

[11] In Ricotta v. State of California, 4 F.Supp.2d 961, 985-988 (S.D. Cal. 1998), this Court condemned the practice of ghost-writing. In doing so, the Court discussed several judicial decisions and other authorities that suggest that pleadings filed by pro se litigants who received substantial assistance from an attorney are not entitled to the liberal treatment that normally is afforded pleadings filed by pro se litigants. Id.

might be raised in the future if Plaintiff were to prove that she properly presented a valid administrative claim that was received by the relevant federal agency, the United States submits that the dismissal should be with prejudice, notwithstanding the above-referenced theoretical questions and without affording Plaintiff the special deference that normally is afforded to pro se plaintiffs, because: (i) the Court's Dismissal Order outlined several fundamental defects in Plaintiff's Original Complaint, explained the steps that must be taken by Plaintiff to correct such defects, and gave Plaintiff an opportunity to file an amended complaint; (ii) Plaintiff's Amended Complaint failed to correct such defects; (iii) the core allegation in this case is frivolous; and (iv) Plaintiff cannot allege any credible facts to support her claims. See Hagans v. Lavine, 415 U.S. 528, 536 (1974) (citations omitted) ("federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and insubstantial as to be absolutely devoid of merit,' ... 'wholly insubstantial,' ... 'obviously frivolous,' ... 'plainly insubstantial,' ... or 'no longer open to discussion,'"); Conley v. Gibson,355 U.S. 41, 45-46 (1957) (on first dismissal, plaintiff will be permitted leave to file amended complaint unless beyond doubt that plaintiff can prove no set of facts that would warrant legal relief); Griggs v. Pace American Group, Inc., 170 F.3d 877, 880 (9th Cir. 1999) (propriety of motion to amend determined by ascertaining the presence of any of our four factors: bad faith; undue delay; prejudice to opposing party; and/or futility); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se litigants must be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that the deficiencies ... could not be cured by amendment .")

III. CONCLUSION

For these reasons, and the reason set forth in Defendants' Memorandum, Defendants' Reply Memorandum, and the Dismissal Order (which were filed and/or issued in connection with the motion to dismiss the Original Complaint and are incorporated herein by reference, the Amended Complaint must be dismissed with prejudice.

April 7, 2000
DATE

Respectfully submitted,
GREGORY A. VEGA
United States Attorney
/s/ Peter J. Sholl
Assistant U.S. Attorney

Attorney for Defendant

APP. 36

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BARBARA ANN JOHNSON, Plaintiff, vs. UNTED STATES OF AMERICA, Defendant	Case No.: No. 99-CV-1173-J (JFS) NOTICE OF OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT DATE: May 15, 2000 TIME: 10:30 a.m. Ctrm: 12 FILED MAY 4, 2000

TO DEFENDANT AND ITS ATTORNEYS OF RECORD, GREGORY V. VEGA AND PETER J. SHOLL:

PLEASE TAKE NOTICE that on May 15, 2000, at 10:30 a.m., or as soon thereafter as the motion may be heard, in the courtroom of the Honorable Napoleon A. Jones, Jr., plaintiff BARBARA ANN JOHNSON, in pro se, will oppose defendant's motion to dismiss her amended complaint pursuant to Rule 4 and 12 of the Federal Rules of Civil Procedure and will be based upon the files and records of this case, together with the attached

memorandum of points and authorities and upon any further oral or written evidence that may be presented at the hearing on the merits.

May 1, 2000
DATE

/S/ Barbara Ann Johnson
BARBARA ANN JOHNSON

Plaintiff

In Pro Se

APP. 38

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BARBARA ANN JOHNSON,

Plaintiff,

vs.

UNTED STATES OF AMERICA,

Defendant

Case No.: No. 99-CV-1173-J (JFS)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

DATE: May 15, 2000
TIME: 10:30 a.m.
Ctrm: 12

I
Introduction

Plaintiff alleges that on or about April 19, 1978, defendant caused a radioactive ship to be implanted behind her left ear without her consent or knowledge. Plaintiff alleges that said implantation has caused damage to her central nervous system, damage to her liver, insomnia, diarrhea, headaches, earaches, dizziness, over sensitivity to light, vomiting, stomach pain and radioactive poisoning, in addition to allegations of the continual invasion of her right to privacy.

The amended complaint alleges that on August 21, 1998, plaintiff submitted a claim based upon the above-motioned allegations to Janet Reno, United States Attorney General, Department of Justice. A declaration of Arlene A. Ranson was filed with this Court attesting to that fact. A copy of plaintiff's CLAIM FOR DAMAGE, INJURY OR DEATH was attached to her amended Complaint for Damages Due to Conspiracy and Personal Injury.

The amended complaint further alleges that as of the date of filing the complaint herein, the Department of Justice had neither rejected or accepted her claim and that her complaint was being filed pursuant to 28 USC §2675(a) and that plaintiff elected to consider the Department of Justice's failure to act as a final denial of her claim.

II

ARGUMENT

Defendant moves to dismiss the amended complaint herein upon the grounds that plaintiff failed to file an administrative claim with the proper United States Agency. However, plaintiff did file a claim for her injuries with the United States Attorney General, Department of Justice. The Declaration of Arlene A. Ranson on file herein attests to that fact.

28 USC § 2675 states that an action shall not be instituted upon a claim against the United States for money damages for injury or personal injury caused by the negligent or wrongful act of any employee of the government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and her claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The statute also states

that the failure of the agency make a final disposition of the claim within six months after the claim was filed, at the option of the claimant anytime thereafter, may be deemed a final denial of the claim. Plaintiff mailed her claim to the Department of Justice on August 21, 1998. Nine months later plaintiff had received no response to her claim from the Department of Justice. Therefore, pursuant to the provision of 28 USC § 2675, plaintiff had the legal right to file the complaint herein. (Parker v. United States, 935 F.2d 176, 177 (9th Cir. 1991.); Reno v. United States, 98 F.3d 73 (1996).)

Plaintiff proceeded in this action upon a presumption that her claim had been received by the United States Department of Justice because the claim had been placed in a sealed envelope with first-class postage fully prepaid thereon and properly addressed to Janet Reno, United States Attorney General, in Washington, D.C. and that said envelope was deposited with the United States Postal Service in Santee, California. (Defendant does not dispute that the envelope was correctly addressed.)

Defendant contends that the said envelope was never received by the Department of Justice; however, the presumption of plaintiff is not misplaced. Both California and Federal law presumes that proof of mailing creates a presumption of receipt by the addressee. (Cordaro v. Lasardi, 254 F.Supp. 1147 (1973); In re Conservatorship of Wyatt (App.4th Dist. 1987) 195 Cal.App.3d 391; 240 Cal.Rptr. 632.) California law further states that service is complete at the time a document is deposited in the United States Mail. (Silver v. McNamee (App. 4th Dist. 1999) 69 Ca.App. 4th 269; 81 Cal.Rptr.2d 445; Sharp v. Union Pacific R.R. Co (App. 5th 1992) 8 Cal.App.4th 357; 9 Cal.Rptr. 925; McKeon v. Sambrano (1927) 200 Cal. 739; 255 P. 178; In re Richard's Estate (1908) 154 Cal. 478; 98

P. 528; Brown v. Greene (1884) 65 Cal. 221; 3 P. 811.)

Plaintiff made a plausible presumption that as the envelope containing her claim was not returned to her as undeliverable, the envelope containing her claim had been received by the United States Justice Department.

It is true that the presumption of receipt is a rebuttable one, which defendant must overcome. (Cordaro v. Lusardi, Supra at page 1149; People v. Cavanaugh (1965) 234 Ca.App.2d 476; 37 Cal.Rptr. 489.); however, it is the addressee who assumes the risk of the failure of the mail. (McKeon v. Sambrano, Supra.). Thus, the addressee must overcome the presumption of receipt with sufficient evidence to do so; otherwise the Court may proceed with jurisdiction. (Cordaro v. Lusadi, Supra; Forslund v. Forslund, Supra.)

If this Court decides that the Department of Justice did not receive plaintiff's claim based upon the evidence presented, the Court has no alternative, but to dismiss the plaintiff's amended complaint for lack of jurisdiction. (Avril v. United States 461 F.2d 1090 (9th Cir. 1972.) However, this Court should not dismiss the amended complaint with prejudice as plaintiff's alleged injuries and damages are still incurring and plaintiff did not become aware of the cause of her injuries until 1998 and could possibly still meet the two-year limitation in filing her claim with the appropriate Federal Agency pursuant to the Federal Tort Claims Act, 28 USC § 2675.

III

CONCLUSION

For the reasons, points and authorities cited above, this Court should deny defendant's motion to dismiss her amended complaint. However, if the court decides to

dismiss the amended complaint, plaintiff demands that the Court do so without prejudice so as to allow the plaintiff to correct the fatal element of her amended complaint.

May 1, 2000
DATE

/s/ Barbara Ann Johnson
BARBARA ANN JOHNSON
Plaintiff
In Pro Se

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BARBARA ANN JOHNSON,	Case No.: No. 99-CV-1173-J (JFS)
Plaintiff,	DATE: May 15, 2000 TIME: 10:30 a.m. Ctrm: 12
vs.	
UNTED STATES OF AMERICA,	REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT
Defendant	ORAL ARGUMENT NOT REQUIRED

On May 8, 2000, the United States obtained a copy of Plaintiff's Memorandum Of Points And Authorities In Opposition To Defendant's Motion To Dismiss Plaintiff's Amended Complaint ("Plaintiff's Opposition Memorandum").[1] This reply memorandum will briefly respond to the arguments

[1] Counsel for the United States has not yet been formally served with a copy of Plaintiff's Opposition Memorandum as of the date of this memorandum.

raised by Plaintiff's Opposition Memorandum.

Plaintiff persists in arguing that she is entitled to a presumption that her FTCA administrative claim was "received" because Arlene A. Ranson signed a declaration stating that she "mailed" Plaintiff's administrative claim to the Attorney General of the United States. Plaintiff's Opposition Memorandum at 3-4. This argument ignores the Court's prior ruling on this point, which made clear that Plaintiff has the burden of proving that the relevant federal agency actually received her FTCA administrative claim. Order Dated February 23, 2000 at 5-6. Moreover, even if the Court were to find that Plaintiff is entitled to such a presumption – a point which the United States does not concede and, more importantly, the Court does not need to reach [2] -- it is clear that the Unites States

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[2] Plaintiff's argument that the federal courts will presume receipt in cases where a plaintiff can show that he or she mailed a FTCA administrative claim is based on Cordaro v. Lusardi, 354 F.Supp. 1147 (S.D.N.Y. 1973). Plaintiff's Opposition Memorandum at 4-5. In Bailey v. United States, 642 F.2d 344 (9th Cir. 1981), however, the Ninth Circuit specifically discussed Cordaro and declined to recognize the existence of such a presumption under federal law. Bailey, 642 F.2d at 347 and n.1. Instead, the Ninth Circuit in Bailey "[a]ssum[ed], without deciding that such a presumption may arise under federal law, [but concluded that] it was amply rebutted by the affidavits presented to the district court by the government." Id. The same result must follow here. Moreover, to the extent that Plaintiff relies on an alleged presumption of receipt under California law, it should be noted that Bailey rejected the argument that "state law governs the jurisdictional question..." and concluded that interpretation of the FTCA statue of limitations "is matter of federal law." Id.

rebutted [3] any alleged presumption by providing two declarations which established that Plaintiff's FTCA administrative claim was not received by the relevant federal agency. It also is clear that Plaintiff has not introduced any evidence, which would overcome the evidence introduced by the United States. Therefore, Plaintiff's Amended Complaint must be dismissed because she still has not proved that her administrative claim was received by the relevant federal agency and because she still has not corrected the defects outlined by the Court in its Order dated February 23, 2000. [4]

Plaintiff concedes that "the Court has no alternative...but to dismiss [P] laintiff's [A] mended [C]omplaint for lack of jurisdiction" if the Court finds that the relevant federal agency did not receive Plaintiff's FTCA administrative claim. Plaintiff's Opposition Memorandum at 4. Nevertheless, Plaintiff argues that the Court should dismiss the Amended Complaint without prejudice because Plaintiff "could still possibly meet the two-year limitation in filing her claim with the appropriate Federal Agency...." Id. At 4-5. The United States disputes that assertion. Moreover, without even reaching the question whether Plaintiff "could still possibly meet the two-year

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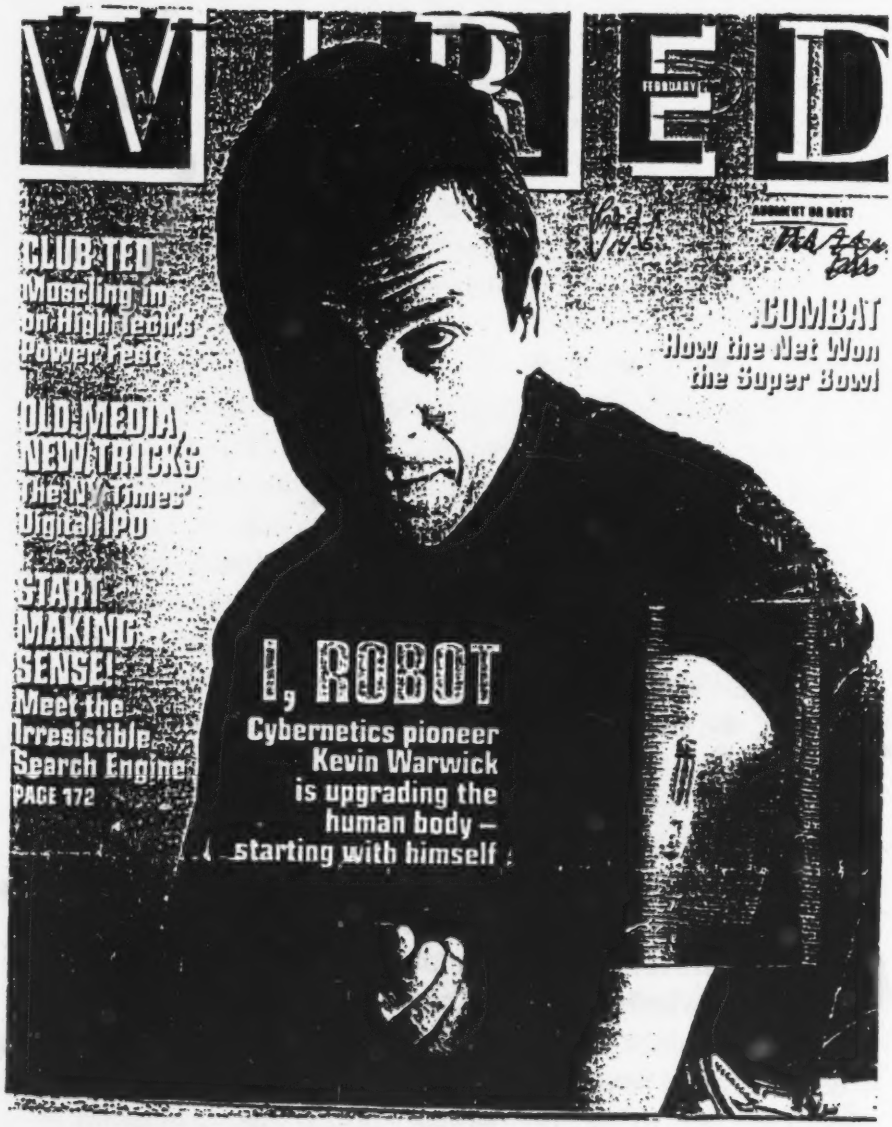
[3] Plaintiff acknowledge that the presumption she is attempting to rely on 'is a rebuttable one." Plaintiff's Opposition Memorandum at 4.

[4] Plaintiff's Opposition Memorandum failed to respond to the United States' argument that the Amended Complaint is still subject to dismissal for lack of personal jurisdiction. See United States Memorandum Of Points And Authorities In Support Of Motion To Dismiss Amended Complaint, Part III.C. That fact alone suggests that the instant motion should be granted, at least to the extent it is based on the argument that the Court presently lacks personal jurisdiction over the United States. See Civil Local Rule 7. 1.f.3.

limitation in filing her claim with the appropriate Federal Agency..." id. 4-5, the Court should dismiss the Amended Complaints without further leave to amend for the reasons Set forth in the United States' Memorandum of Points And Authorities In Support Of Motion To Dismiss Amended Complaint, Part III.D.

May 8, 2000
DATE

Respectfully submitted,
GREGORY A. VEGA
United States Attorney
/s/ PETER J. SHOLL
Assistant U.S. Attorney
Attorneys for the United States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I, ROBOT
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APP. 48

"WIRED" MAGAZINE ARTICLE
February 2000 Issue

CYBORG 1.0

KEVIN WARWICK OUTLINES HIS PLAN TO BECOME ONE WITH HIS COMPUTER.

I was born human. But this was an accident of fate- a condition merely of time and place. I believe it's something we have the power to change. I will tell you why.

In August 1998, a silicon chip was implanted in my arm, allowing a computer to monitor me as I moved through the halls and office of the Department of Cybernetics a the University of Reading, just west of London, where I've been a professor since 1988. My implant communicated via radio waves with a network of antennas throughout the department that in turn transmitted the signals to a computer programmed to respond to my actions. At the main entrance, a voice box operated by the computer said "Hello" when I entered; the computer detected my progress through the building, opening the door to my lab for me as I approached it and switching on the lights. For the nine days the implant was in place, I performed seemingly magical acts simply by walking in a particular direction. The aim of this experiment was to determine whether information could be transmitted to and from an implant. Not only did we succeed, but the trial demonstrated how the principles behind cybernetics could perform in real-life applications.

Eighteen months from now, or possibly sooner, I will conduct a follow-up experiment with a new implant

That will send signals back and forth between my nervous system and a computer. I don't know how I will react to unfamiliar signals transmitted to my brain, since nothing quite like this has ever before been attempted. But if this test succeeds, with no complications, then we'll go ahead with the placement of a similar in my wife, Irena.

MY RESEARCH TEAM IS MADE UP OF 20 scientists, including two who work directly with me: Professor Brian Andrews, a neural-prosthesis specialist who recently joined our project from the University of Alberta in Canada, and professor William Harwin, a cybernetics expert and former co-director of the Rehabilitation Robotics Laboratory at the University of Alberta in Canada, and professor William Harwin, a cybernetics expert and former co-director of the Rehabilitation Robotics Laboratory at the University of Delaware in the U.S. The others are a mixture of faculty and researchers, divided into three teams charged with developing intelligent networks, robotics, and sensors, and biomedical signal processing – i.e., creating software to read the signals the implant receives from my nervous system and to condition that data for retransmission.

We are in discussion with Dr. Ali Jamous, a neurosurgeon at Stoke Mandeville Hospital in nearby Aylesbury, to insert my next implant, although we're still sorting out the final details. Ordinarily, there might be a problem getting a doctor to consider this type of surgery, but my department has a long standing research link with the hospital, whose spinal injury unit does a lot of advanced work in neurosurgery. We've collaborated on a number of projects to help people overcome disabilities through technical aids: people with spinal injuries, and a self-navigating wheelchair. While Jamous has his own research agenda, we are settleling on a middle ground that will

satisfy both parties' scientific goals.

My first implant was inserted by Dr. George Boulos at Tilehurst Surgery in reading into the upper of my left arm, beneath the inner layer of skin and on top of the muscle. The next device will be connected to the nerve fiber, in my left arm, position about halfway between my elbow and shoulder. (It doesn't matter which arm carries the implant; I chose my left because I'm right-handed, and I hope I will suffer less manual impairment if any problems arise during experiment.) Most of the nerves in this part of the body are connected to the hand and send and receive the electronic impulses that control dexterity, feeling, even emotions. A lot of these signals are traveling here at any given time. This nerve center carries more information than any other part of the anatomy, aside from the spine and the head (in the optic and auditory nerves), and so is large and quite strong. Moreover, very few of the nerves branch off the muscles and other parts of the upper arm – it's like a freeway with only a few on-and off ramps, providing a cleaner pathway to the nervous system.

While we ultimately may need to place implants nearer to the brain – into the spinal cord or onto the optic nerve, where there is a more powerful setup for transmitting and receiving specific complex sensory signals the arm is an ideal halfway point.

This implant, like the first, will be encased in a glass tube. We chose glass because it's fairly inert and won't become toxic or block radio signals. There is an outside chance that the glass will break, which could cause serious internal injuries or prove fatal, but our previous experiment showed glass to be pretty rugged, even when it's frequently jolted or struck.

One end of the glass tube contains the power supply a copper coil energized by radio waves to produce an

electric current. In the other end, three mini printed circuit boards will transmit and receive signals. The implant will connect to my body through a band that wraps around the nerve fibers – it looks like a little vicar's collar – and is linked by a very thin wire to the glass capsule.

The chips in the implant will receive signals from the collar and send then to a computer instantaneously. For example, when I move a finger, an electronic signal travels from my brain to activate the muscle and tendons that operate my hand. The collar will pick up that signal en route. Nerve impulses will still reach the finger, but we will tap into them just as though we were listening in on a telephone line. The signal from the implant will be analog; we'll have to convert it to digital in order to store it in the computer. But then we will be able to manipulate it and send it back to my implant.

No processing will be done inside the implant. Rather, it will only send and receive signals, much like a telephone handset sends and receives sound waves. It's true that onboard power would increase our options for programming more complex tasks into the implant, but that would require a much larger device. While a 1-inch long glass tube isn't obtrusive, I really don't fancy an object the size of an orange built into my arm.

WE'LL TAP INTO MY NERVE FIBERS AND TRY a progression of experiments once my new implant is switched on. One of the first will be record and identify signals associated with motion. When I waggle my left index finger, it will send a corresponding signal via the implant to the computer, where it will be recorded and stored. Next, we can transmit this signal to the implant, hoping to generate an action similar to the original. I will consider the test a fantastic success if we can record a movement, then reproduce it when we send the signals

back to the arm.

Pain also provides a distinctly clear electronic signal on the nervous system as it moves from its pint of origin to the brain. We intend to find out what happens if that signal is transmitted to the computer and then played back again. Will I feel the same sensation, or something more akin to the phantom pains amputees "feel" in their missing limbs? Our brains associate an ache with a specific point on the body; it will also be interesting to see whether this sensation can be manipulated by slightly modifying the signal in the computer and then trying to send it to another area.

We will then attempt this exercise with emotions signals. When I'm happy, we'll record that signal. Then, if my mood changes the next day, we'll play the happy signal back and see what happens.

I am most curious to find out whether implants could open up a whole new range of senses. For example, we can't normally process signals like ultraviolet, X rays, or ultrasound. Infrared detects visible heat given off by a warm body, though our eyes can't see light in this part of the spectrum. But what if we fed infrared signals into the nervous system, bypassing the eyes? Would I be able to learn how to learn how to perceive them? Would I feel or even "see" the warmth? Or would my brain simply be unable to cope? We don't have any idea – yet.

The potential for medical breakthrough in existing disabilities is phenomenally important. Might it be possible to add an extra route for more sense or to provide alternative pathways for blind or deaf people to "see" or "hear" with ultrasonic and infrared wavelengths? Perhaps a blind person could navigate around objects with ultrasonic radar, much the way bats do. Robots have been programmed to perform this action already, and

neuroscientists have not dismissed the idea for humans. But few people have ever had their nervous systems linked to a computer, so the concept of sensing the world around us using more than our natural abilities is still science fiction. I'm hoping to change that.

People have asked me, too, whether it would be possible to get high from drugs, store those signals, and then return them to the nervous system later to reproduce the sensation. To that end, I plan to have a glass or two of wine and record my body's reaction, captured in exactly the same way I "saved" movement or pain. The following day, I will play back the recorded signals. As my brain tries to make sense of these, it might search for past experiences, trying to put things in terms of what it already knows. Thus, when my brain receives the "drunk" signal, it might believe it is indeed intoxicated. Varying on that theme, perhaps particular electronic patterns can be transmitted to the nervous system to bring about a sensation equivalent to that of drinking bourbon or rum.

If this type of experiments works, I can foresee researchers learning to send antidepressant stimulation or even contraception or vaccines in a similar manner. We have the potential to alter the whole face of medicine, to abandon the concept of feeding people chemical treatments and cures and instead achieve the desired result electronically. Cyberdrugs and cybernarcotics could very well cure cancer, relieve clinical depression, or perhaps even be programmed as a little pick-me-up on a particularly bad day.

We don't know how much the brain can adapt to unfamiliar information coming in through the nerve branches. Our hunch is that the brain of a young child is pliable, so that it might well be able to take in a new

sensory information in its own right. In response to the additional input, the nerve fibers linked to an implant might begin to grow thicker and more powerful with the ability to carry more and different kinds of information. A 45-year-old brain like mine is another matter. In the absence of any previous sensory reference, will my brain be able to process signals that don't correspond precisely to sight, sound, smell, taste, or touch? It will probably deal with something like X-ray stimulation in terms of the signals it thinks most similar. Depending on its best guess, I might feel pain, tension, or excitement. But we want to avoid feeding in too much noise, as that could be distinctly risky. I do worry that certain kinds of raw input could make me crazy. For me, in any case, all these experiments are worth doing just to see what might happen. If the results aren't encouraging, then – what the hell – at least I tried.

I PLAN TO KEEP MY NEXT IMPLANT IN PLACE FOR a minimum of a week, possibly up to two. If the experiments are successful, we would then place implants into two people at the same time. We'd like to send movement and emotion signals from one person to the other, possibly via the Internet. My wife, Irena, has bravely volunteered to go ahead with his-and-hers implants. The way she puts it is that if anyone is going to jack into my limbic system – to know definitely when I'm feeling happy, depressed, angry, or even sexually aroused – she wants it to be her.

Irena and I will investigate the whole range of emotion and sensation. If I move a hand or finger, then send those signals to Irena, will she make the same movement? I think it likely she'll feel something. Might she feel the same pain as I do? If I sprained my ankle, could

I send the signal to Irena to make her feel as though she has injured herself?

We know that different people have varying emotional responses to the same stimulus. If I send a particular signal to her, will she recognize it in the same way? Based on my own reaction to having emotional impulses replayed on my nervous system, we will have a preliminary idea of what Irena might experience, but we are entering progressively uncharted territory once we attempt to relay prerecorded signals. What her brain can comprehend in terms of my neural impulses is completely unknown. Yet if Irena's brain can make out, even roughly, my incoming signals, then I believe her own stored knowledge will be able to decipher the information into a recognized sensation or emotion.

We would also like to demonstrate how the signals could be sent over the Internet. One of us will travel to New York, and the other will remain in the UK. Then we'll send real-time movement and emotions signals from person to person across the continents. I am terrified of heights. If I'm staying on the 16th floor of a hotel in the US and I transmit my signals to Irena, how will they affect her? How far could we go in transmitting feelings and desires? I want to find out. What if the other person became sexually aroused? Could we record signals at the height of our arousal, then play these back and relive the experience? (As keen as I am to know the answer here, I have difficulty imaging what the scientific press might make of it.)

<u>WE ARE NOT THE FIRST GROUP TO LINK</u> computers with the human nervous system via implants. Dr. Ross Davis' team at the Neural Engineering Clinic in Augusta, Maine, has been trying to use the technology to treat patients whose central nervous system have been damaged or affected by disease like multiple sclerosis, and

has been able to achieve basic controls over, for example, muscle function.

In 1997, a widely publicized project at the University of Tokyo attached some of a cockroach's motor neurons to a microprocessor. Artificial signals sent to the neurons to a microprocessor. Artificial signals sent to the neurons through electrodes were then used to involuntarily propel the cockroach, despite what it might have chosen to do. Also, in an experiment published last summer by John Chaplin at the MCP Hahnemann School of Medicine in Philadelphia and Miguel Nicolelis at Duke University, electrodes were implanted into rats' brains and used to transmit signals so that the rats merely had to "think" about pressing a lever in order to receive a treat. Researchers were interested to learn that the signals indicating what the rats were about to do appeared in a different part of the brain than the one usually associated with planning.

And I'm amazed by the results from a team at Emory University in Atlanta, which to great international interest has implanted a transmitting device into the brain of a stroke patient. After the motor neurons were linked to silicon, the patient was able to move a cursor on a computer monitor just by thinking about it. That means thought signals were directly transmitted to a computer and used to operate it, albeit in a rudimentary way. The Emory team is looking to gradually extend the range of controls carried out.

As for self-experimentation, physicians and scientist have done this throughout history. During the early '50s, US Air Force Colonel John Stapp repeatedly strapped his body to rocket sleds and propelled himself to more than 600 mph before hitting the brakes to stop in less than 2 seconds. The military physician's study of the human body's tolerance for crash forces helped improve

automobile, airplane, and spacecraft safety. Although Stapp survived his perilous experiments, he suffered eye damage, a hernia, a concussion, and broken bones and permanently impaired his sense of balance.

In 1984, Barry Marshall, a resident at Royal Perth Hospital in Australia, swallowed an ulcer-causing bacteria to show that the organism, and not stress, caused the abdominal ailment. Then there was Werner Forssmann, a German physician so obsessed with learning the intricacies of the human heart that in 1929 he inserted a catheter into an artery in his arm and snaked it all the way to his right auricle. In 1892, another German doctor, Max von Pettenkofer, drank a culture of the bacterium that causes cholera to show that environmental factors must also be presented before the germ produces the disease. He was sick for about a week but lived – pure luck, of course, since we now know his hypothesis was erroneous. And Isaac Newton stuck needles into his eyes – for what reason, I'm not entirely sure.

AS FOR ME, I AM NOT A FOOLISH SCIENTIST putting my life in harm's way. In fact, my next implant will be the culmination of my professional work: working for British Telecom, studying computer engineering and robotics, and teaching the principles of cybernetics. I have been involved with technology all my life, and now I will be able to take my research one step further.

Admittedly, I'm putting the neurological and medical aspects of the operation in the hands of the surgeon. I realize the chance of infection is higher with my second implant, since it will touch the nerve bundles. And connecting to the nervous system could also lead to permanent nerve damage, resulting in the loss of feelings or movement, or continual pain. But I am putting aside my

fears and accepting my less-than-absolute understanding of the technical and psychological ramifications inherent in our attempt. I want to know.

I believe this desire – this urge to explore – is intrinsically human. My entire team is venturing into the unknown with me in order to bring humans and technology together in a way that has never been attempted. The excitement of looking over the horizon into a new world – the world of cyborgs – far outweighs the risks. Just think: Anything a computer link can help operate or interface with could be controllable via implants: airplanes, locomotive, tractors, machinery, cash registers, bank accounts, spreadsheets, word processors, and intelligent homes. In each case, merely by moving a finger, one could cause such systems to operate. It will, of course, require the requisite programs to be set up, just as keyboard entries are now required. But such programming, along with the implant owner learning a few tricks, will be relatively trivial exercises.

Linking up in this way could allow for computer intelligence to be hooked more directly into the brain, allowing humans immediate access to the Internet, enabling phenomenal math capabilities and computer memory. Will you need to learn any math if you can call up a computer merely by your thoughts? Must you remember anything at all when you access a world Internet memory bank?

I can envision a future when we send signals so that we don't have to speak. Thought communication will place telephones firmly in the history books. Philosophers point to language in humans as being an important part of our culture and who we are. Certainly, language has had everything to do with human development. But language is merely a tool we use to translate our thoughts. In the future, we won't need to code thoughts into language – we

will uniformly send symbols and ideas and concepts without speaking. We will probably become less open, more able to control our feelings and emotions – which will also become necessary, since others will more easily be able to access what we're thinking or feeling. We will still fall back on speech in order to communicate with our newborns, however, since it will take a few years before they can safely get implants of their own, but in the future, speech will be what baby talk is today.

THOUGHT-TO-THOUGHT COMMNICATION is just one feature of cybernetics that will become vitally important to us as we face the distinct possibility of being superseded by highly intelligent machines. Humans are crazy enough not only to build machines with an overall intelligence greater than our own, but to defer to them and give them power that matters. So how will humans cope, later this century, with machines more intelligent than us? Here, again, I believe cybernetics can help. Linking people via chip implants directly to those ~~m~~achines seems a natural progression, a potential way of harnessing, intelligence by, essentially, creating super humans. Otherwise, we're doomed to a future in which intelligent machines rule and humans become second-class citizens. My project explores a middle ground that gives humans a chance to hang in there a bit longer. Right now, we're moving toward a world where machines and humans remain distinct, but instead of just handing everything over to them, I offer a more gradual co-evolution with computers.

Yet once a human brain is connected as a node to a machine – a networked brain with other human brains similarly connected – what will it mean to be human? Will we evolve into a new cyborgs community? I believe humans will become cyborgs and no longer be stand-alone

entities. What we think is possible will change in response to what kinds of abilities the implants afford us. Looking at the world and understanding it in many dimensions, not just three, will put a completely different context on how we – whatever "we" are – think.

I base this on my own experience with my first implant, when I actually became emotionally attached to the computer. It took me only a couple of days to feel like my implant was one with my body. Everyday in the building where I work, things switched on or opened up for me – it felt as though the computer and I were working in harmony. As a scientist, I observed that the feelings I had were neither expected nor completely explainable – and certainly not quantifiable. It was a bit like being half of a pair of Siamese twins. The computer and I were not one, but neither were we separate. We each had our own distinct but complementary abilities. To be truthful, Irena started to get rather worried – jealous, perhaps – when I tried to explain these sensations.

With the new implant, I expect this feeling of connectedness to be much stronger, particularly when emotional signals are brought into the equation. From a medical point of view, I was pleased when the first implant was taken out, but I was otherwise quite upset – I felt as though a friend had just died. With the new implant I might find it impossible to let go, despite the potential for long-term problems were I to retain it.

These desires – which draw me closer to the implant – could ultimately influence my own values and what it means to be human. Morals and ethics are an outgrowth of the way in which humans interact with each other. Cultures may have diverse ethics, but, regardless, individual liberties and human life are always valued over and above machines. What happens when humans merge

with machines? Maybe the machines will then become more important to us than another human life. Those who have become cyborgs will be one step ahead of humans. And just as humans have always valued themselves above other forms of life, it's likely that cyborgs will look down on humans who have yet to "evolve."

SUPRISINGLY, NOBODY HAS REACTED TO MY plans by telling me, "That's impossible" – I think because no one really knows what will happen. When I tell others about my work, more often they are aghast, not really comprehending what I'm talking about. But no scientists have told me I shouldn't be playing God or that what I'm doing is unfeasible or too dangerous. Even so, I am certain that after Alexander Graham Bell said, "Mr. Watson, come here, I want you," the cynics asked, "Why didn't you just walk to the next room and speak to him?" At the time, it was difficult to see where it all might lead. Of course, I don't put myself in the same category as Bell Charles Lindbergh or John F. Kennedy – Pioneers who were convinced we could do things like land men on the moon. But I've been inspired by these visionaries, these risk takers, each of whom spent his lifetime obsessively pursuing his goals.

Since childhood I've been captivated by the study of robots and cyborgs. Now I'm in a position where I can actually become one. Each morning I wake up champing at the bit, eager to set alight the 21st century – to change society in ways that have never been attempted, to change how we communicate, how we treat ourselves medically, how we convey emotion to one another, to change what it means to be human, and to buy a little more time for ourselves in the inevitable evolutionary process that technology has accelerated. In the meantime, I feel like screaming when I have to do paperwork or shop or go to sleep – it's stopping me from getting on with what I really want to do. The Next implant cannot come soon enough.

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NEURO MASTER

For Caltech's Steve Potter, the road to brain implants begin with a virtual rat.

By Sean Stewart

"There!" says Steve Potter, pointing to a wave of spikes flashing across his 20-inch computer monitor. A second later, a roar of static comes from the desktop speakers, like thunder following lighting. Potter is a senior research fellow in biology working at the California Institute of Technology's Biological Imaging Center in Pasadena, California, and I'm standing at the output end of his four-year project to build the first multichannel, two-way neural interface. While some scientist believe we can bridge the hardware/wetware gap and transmit external data through neural clusters elsewhere in the body, Potter is pursuing the cranial route as a digital gateway to the brain.

At the back of Potter's lab is the input end of his project – a 1.5-centimeter dish that contains a living layer of rat neurons growing over a microelectrode array. The MEA records neural activity then sends it to and SGI 540 workstation that renders the data into the neural seismograph I'd just watched streak across Potter's monitor.

The neural pulses received by the MEA can be fed into pattern-recognized software that responds in real time by selectively firing the MEA's electrodes. In other words, the computer pretends to be the body attached to the "brain" lying in the dish. This interface, while still

primitive, is the foundation for technology that will help us eradicate conditions like paralysis and steer our cars with our minds, controlling the increasingly computerized world around us at the speed of thought.

Last spring, Potter received $1.2 million from the National Institute of Health to grow his virtual rat, which performs a fiendishly ingenious end run around the biggest obstacle in neurological research: Traditionally, you can either examine a brain slice's dead cells long after they've stopped doing anything interesting, or you can watch a live animal learn and behave. In either case, you never get to see what's happening at the cellular level. Until now.

As Potter's thousands of neurons go about the task of perceiving their computer-simulated world and organizing themselves to make sense of it, he can watch everything they do-cell by cell and second by second. His instruments: the MEA, a high-speed camera that can capture neural events I real time, and the two-photon scanning microscope he put together himself in 1994 that lets him study living neurons at submicron resolution without harming them.

The input ports on this particular slab of neural goo allow Potter to watch living neurons going about their business as he feeds them simple signals. "We have just parachuted into that jungle, and we think we know the humans from the gorillas, "says Potter. "We have begun setting off firecrackers and have seen a response. The next step is to do a lot eavesdropping, then we try to repeat the phonemes we hear, and see if more intelligible response come." Potter expects his computer to "speak" in response to the neurons' firing pattern within six months. Only then will the true feedback loop begin.

The most obvious near-term application for this type of technology would, for instance, give a patience an

artificial limb that could respond to their brain's instruction as their real arm did. Steve Otto, audiologist for the Auditory Brainstem Implant Project at the House ear Institute in Los Angles, thinks it likely that between new design and ever improving ways of coding sensory data far the brain, we will someday be able build completely implantable devices that interface microscopically with parts of the normal systems that are still physiologically functional. "Perhaps implants will enhance normal perception, functions, or performance," he adds. "Or we'll have ESP for everyone."

In 1994, Bruce McNaughton, a psychology professor at the University of Arizona, and postdoctoral student Matt Wilson recorded neural patterns in the brain of rats as they foraged for food – then caught them dreaming about it afterward as electrodes picked up the same firing patterns in the sleeping rats. These results are significant because they indicate that animals can rehearse physical activities in the motor cortex without actually moving.

But can the process be reversed – in humans? If I spent a day at the basketball court shooting free throws and compiling a good scan of my neural activity, could I fire up those same neural patterns later and keep "practicing' my shot – even optimizing it – while I slept?

"Sure, your dream-sleep learning example is probably not a bad idea," Potter tells me. "I'd love to do something more useful during that third of my life."

In the meantime, his virtual-rat project faces a number of technical challenges, such as how exactly he's going to pull patterns out of data streaming in from his dish of neurons at 2.3 Mbytes per second, per channel – enough to max out a multigig hard disk in one afternoon. If you were using the same technology to record input from every neuron in a human brain, you'd get 150 million Gybtes of

data per minute – enough to fill a 194-mile-high stack of CD-ROMS in 60 seconds.

Potter thinks Moore's law and advances in data will solve that problem – so long as he has only 60 channels recording from a few hundred neurons. But he must still figure out how to analyze volumes of real-time data and fine-tune his inputs so he can quickly feed coherent information back through the MEA to his virtual rat.

After that, he hopes to someday connect with an artificial intelligence stupendously smarter than we are, which will show us how to move beyond our limits. "I decided in the course of my research – and as the result of a lot of undergraduate soul-searching in the Reagan era, when I had frequent nightmares of a Dr. *Strangelove* scenario – that what humans need is to be a lot smarter," he says. "Just look at how many amazing things are done by a computer that weighs only a couple pounds, consumes only about 100 watts, and lasts 100 years."

Some people – me, for instance – might wonder how good an idea it is to devote a life's work to making our brains obsolete. But I take comfort in the thought that by the time Potter's way-smart computer arrives, people of my generation will be fitted with cranial implants that can hear our children's eyes roll as we pine for the days when *Homo sapiens* was still the most intelligent thing on the planet.

"I am sure that we are missing some very fundamental thing about how brains do what they do…but jacking in is already a reality with my Palm III," says Potter, whipping his PDA out from a hip holster he designed himself." This makes me quite a bit smarter."